142269

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

AUG 8 2001

RSPA-99-6223-5

Ms. Rosalind A. Knapp
Acting General Counsel
Department of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590

Dear Ms. Knapp:

For the reasons described below, we are returning to you for reconsideration a draft proposed rule from the Department of Transportation's (DOT) Research and Special Programs Administration entitled, "Hazardous Materials: Safety Requirements for External Product Piping on Cargo Tanks Transporting Flammable Liquid," submitted to the Office of Management and Budget (OMB) under Executive Order (E.O.) No. 12866 on April 26, 2001. Our staff is willing and prepared to work with DOT on the issues identified below so that a revised package can be resubmitted to OMB in a timely fashion.

This proposed rule would amend DOT's Hazardous Materials Regulations to prohibit flammable liquids from being transported in unprotected product piping ("wetlines") on DOT specification cargo tank motor vehicles. DOT estimates that to comply with this requirement over a 5-year period, over 28,000 cargo tanks will need to be retrofitted and over 7,600 newly constructed cargo tanks will be installed with a short-loading-lines system. DOT further estimates that the costs of this rule will be $63.3 million and benefits will be $68.2 million to $106.7 million (discounted present value over 30 years). These monetized costs reflect compliance costs, and monetized benefits represent an average of 1.5 fatalities/year and 0.25 injuries/year reduced over a 30-year period (1.62 fatalities/year and 0.25/ injuries/year when fully implemented after phase-in period) and $1 - $5 million per year in avoided costs of highway closures, evacuations, and environmental damage.

In May 1998, the National Transportation Safety Board (NTSB) issued a report on the collision of a tractor/cargo tank semitrailer and a passenger vehicle and subsequent fire that occurred in Yonkers, New York on October 9, 1997. This report recommended that the Secretary of Transportation prohibit the carrying of hazardous materials in external piping of cargo tanks, such as loading lines, that may be vulnerable to failure in an accident. We have studied this NTSB report and believe that NTSB has identified a practice that does increase the severity of accidents involving cargo tanks, though infrequent, when they occur. We believe the practice does raise a real safety concern and is worthy of attention. However, we do have some concerns regarding how DOT is proposing to address these safety risks. In particular, we are concerned about the safety risks and other costs associated with the retrofitting of these cargo tanks, and believe that these issues suggest that DOT seriously consider applying this proposed rule only to new cargo tanks. This concern and others are described in more detail below.

First, we are concerned that the retrofitting of cargo tanks that this regulation requires may increase the risks of injury and fatality to workers who must perform this work. In a recently issued proposed rule (July 3, 2001, *Federal Register* Volume 66. No. 128), DOT itself states that up to 10 fatalities a year may occur due to work on DOT specification cargo tanks. This estimate was based upon anecdotal evidence gathered by the Federal Motor Carrier Safety Administration (FMCSA). Upon OMB inquiry into this matter, DOT discovered that this FMCSA estimate was based on an anecdotal study that discovered 10 deaths in a three to four year period around the mid-1990's. Subsequently, DOT researched the accident database of U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) and, based on that source of data, estimated that possibly two to three fatalities per year occurred between 1985 and 1997 as a result of repair work performed on cargo tanks.

We think these estimates of fatalities resulting from repair work on cargo tanks raise important issues of risk-risk tradeoffs for this rule. In response to OMB questions on this matter, DOT has stated that the risk to workers associated with repair work on cargo tanks is (a) as a result of non-compliance with existing laws and regulations, and (b) small in the case of the retrofits required in this rule, since this work will be done when the tanks are brought in for hydrostatic testing, at which time the cargo tank is emptied of hazardous liquid and filled with water (which reduces the likelihood of accidents). However, consistent with OMB guidance, agencies need to take into account the extent of compliance with existing laws and regulations when estimating the costs and benefits of rules (and we would note that it is very likely that cargo tank accidents would not occur at all if all drivers followed existing traffic laws and regulations). Further, as a matter of practice workers would perform these retrofits first–prior to the hydrostatic testing–since hydrostatic testing is required to be performed after such modifications of cargo tanks.

We recognize that the risks associated with this repair work are short-term in nature, as the retrofits will be performed only once over a 5 year period, and that the magnitude of these risks may not be significant. However, the lifetime risks associated with wetlines accidents is also small, and as such we need to take seriously--and try to avoid--the possibility that we would merely transfer the risks of one activity to another through this regulation.

In short, our primary concern with this rule is that it may actually increase fatalities and injuries. DOT estimates that this rule could save 1.5 lives and reduce 0.25 injuries per year over the next 30 years, but this does not consider a possible increase in fatalities and injuries due to the hazardous nature of performing retrofits on cargo tanks that transport flammable liquids. Similar repair work in the past has resulted in perhaps two to three deaths per year, and an as yet unestimated number of injuries. Hence, we believe DOT needs to more fully examine the best reasonably obtainable information on the consequences of this regulation, as is required by Section 1, paragraph (b)(7) in Executive Order (E.O.) 12866. In compliance with this E.O., DOT should estimate what additional risks (in terms of both fatalities and injuries) may be imposed upon workers as a result of retrofitting cargo tanks under this rule.

Second, and related to the issue raised above, we believe that analysis of the costs and benefits of this rule suggests that DOT propose a regulatory alternative that applies only to new cargo tanks and does not require a retrofit of existing tanks. We believe such a regulatory alternative is more likely than DOT's current proposal to maximize net benefits, as is required by Section 1 paragraph (a) in E.O. 12866. DOT's own analysis shows that the range of net benefits is higher under an alternative that would apply this regulatory standard only to new cargo tanks and cargo tanks less than 15 years old. DOT's analysis estimates net benefits of this alternative to be $7.9 million - $44.6 million over 30 years, while the net benefits of DOT's proposed alternative are estimated to be $4.9 - $43.4 over 30 years. This analysis also shows that by requiring a short-loading lines system only on newly constructed cargo tanks, costs can be reduced by over 50% (from $63.3 million to $29.3 million). DOT estimates that the net benefits of applying this standard only to new tanks *could* be higher (at $6.6 million - $26.9 million over 30 years) than under their draft proposed rule. Further, we believe DOT needs to more fully consider the incremental cost-effectiveness of these retrofits on cargo tanks, as concerns have been raised that DOT has not adequately accounted for the full costs of these retrofits. In taking into account the risks imposed by retrofitting (as discussed in the above paragraphs), concerns about the higher financial costs of retrofitting, as well as other concerns about DOT's current benefits estimates (discussed below), it seems quite likely that the alternative of imposing this requirement only on new cargo tanks will provide greater net benefits at all endpoints as compared to DOT's current preferred regulatory option.

Third, we would encourage DOT to more fully examine and consider, based on the best reasonably obtainable information, whether the fatalities or injuries associated with past accidents with cargo tanks resulted from the accidents themselves or from explosions resulting from the release of a flammable liquid. It may be that these injuries and fatalities would not be avoided by a rule addressing wetlines. In fact, of the six fatalities that occurred from 1996 - 2000 as a result of wetlines related accidents, DOT acknowledges that two of these fatalities may have been caused by the accident itself. However, DOT makes no adjustment for this possibility in its benefits estimates, but rather extrapolates the future benefits of this rule based on the assumption that all of these deaths occurred as a result of a fire/explosion from the release of a flammable liquid from the wetlines.

Finally, we believe other aspects of DOT's analysis need also be more fully examined to allow for a reasoned determination regarding whether the benefits of this regulation justify the costs, which is required by Section 1, paragraph (b)(6) in E.O. 12866. For example, we're concerned that DOT is using a benefits estimation methodology that may be appropriate to produce an initial rough estimate of the potential benefits of broad regulatory strategies, but needs to be more refined if the goal is to estimate the expected benefits of a particular rule. Specifically, DOT estimates the potential benefits of this rule by extrapolating the number of injuries and fatalities from past experience and then multiplying this result by 1.5. When DOT used this same approach in a preliminary analysis of this rule, the agency acknowledged that this might well

overstate the risks, but justified this methodology in the preliminary analysis by stating, "...since the purpose of this analysis is to serve as a first screen for possible rulemaking or other actions, it is appropriate to use high estimates." However, DOT uses this same approach in its analysis of the current draft wetlines rule, with no explanation regarding why an overstatement of risk is still appropriate in this context. In addition, we would note that if DOT considered fatalities that occurred from wetlines related accidents starting in the year 1990 (the starting year that DOT used in its preliminary assessment of this rule which concluded that the costs of this rule likely exceeded the benefits), the fatality rate that occurred in the past would be reduced to 0.72/year.

Due to the concerns listed above, we are returning this rule for your reconsideration. We are aware that NTSB has expressed concern that RSPA has been slow to act on NTSB's recommendations and thus we urge RSPA to resolve this matter as soon as possible. I believe we will be able to quickly resolve these issues through my staff continuing to work with the DOT and RSPA policy officials and engineers who are currently working on this rule, as well as DOT/RSPA analysts with appropriate economic expertise. My staff is available for further discussion on this, and looks forward to working with you in order to ensure that the requirements of Executive Order 12866 are fully met.

Sincerely,

John D. Graham
Administrator
Office of Information
and Regulatory Affairs